

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

February 24, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-2544-CR

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT I

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STATE OF WISCONSIN,

**PLAINTIFF-RESPONDENT,**

V.

RAYMOND JOHNSON,

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOWITZ, Judge.<sup>1</sup> *Reversed and cause remanded with directions.*

SCHUDSON, J.<sup>2</sup> Raymond Johnson appeals from the judgment of conviction, following his *Alford* plea, for possession of cocaine. He argues that

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<sup>1</sup> The judgment of conviction was entered by Judge Richard J. Sankowitz. The motion to suppress at issue in this appeal was decided by Judge Ronald S. Goldberger.

<sup>2</sup> This appeal is decided by one judge pursuant to § 752.31(2), STATS.

the trial court erred in denying his motion to suppress evidence seized during a warrantless search of his car. Specifically, he challenges the trial court's finding that the police officers were more credible than the defense witnesses. Because the transcript reveals one clearly erroneous basis for the trial court's finding and two other significant points of uncertainty directly related to the trial court's comments on credibility, this court reverses and remands to the trial court for its examination of the record, clarification of its findings, and determination of the defense motion.

On March 21, 1996 at about 3:45 a.m., City of Milwaukee Police Officers Sara Dzwonkowski and Timothy McNair were patrolling in an unmarked squad at 21st Street and West National Avenue, an area known for drugs and prostitution. They observed a car pull to the curb where a known prostitute walked to the car and spoke with the driver, Raymond Johnson. Officer Dzwonkowski then exited the squad and spoke with the prostitute, Jo Liska.

At the suppression hearing, Officer Dzwonkowski testified that Liska told her that Johnson "was selling drugs" and that "she believed [Johnson] did have a gun and a very large possibility that it was in the vehicle at that time." Officer Dzwonkowski testified that she told Officer McNair what Liska had told her "regarding the weapon — possible weapon and drugs." Officer McNair, however, testified, "My partner informed me that Ms. Lis[k]a told her that he was selling drugs in the car." Although he acknowledged that it is "consistent with a suspicious drug prostitution type situation for a weapon to be involved," he did not testify that Officer Dzwonkowski had informed him that Liska had referred to a gun. Additionally, Officer Dzwonkowski acknowledged that despite the importance of such an allegation, she had failed to refer to any comment about a gun in the police report she wrote about the incident.

Ms. Liska testified for the defense and, when asked whether she had "indicate[d] to the officer that Mr. Johnson had a gun in his car," she responded, "No, I don't even remember that. I don't remember. I'll be honest. I don't remember saying that." In fact, Johnson did not have a gun on his person or in the car, but the alleged information about drug dealing and the gun led Officer McNair to search the car where he found cocaine.

Johnson also testified. Among other things, he stated that Officer McNair "asked me if I had ever been arrested and I explained to him that I had at one other time and that was pretty much it."

Denying the motion to suppress, the trial court commented on the credibility of the witnesses:

This Court obviously sits and must weigh credibility on the testimony. The officer's testimony is consistent. It does over-exaggerate. The Court does take into account both the defendant by his own admission he has at least one criminal conviction and therefore this Court can consider that credibility for purposes of these proceedings as well as a conviction.

As Johnson concedes, a police officer's warrantless search of the passenger areas of a car where a weapon may be placed or hidden is lawful if the officer has "a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer[ ] in believing that the suspect is dangerous and the suspect may gain immediate control of [a] weapon[ ]." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). Further, Johnson implicitly concedes that the officers' testimony, if credible, would establish the basis for the search in this case. Johnson maintains, however, that the trial court's credibility finding is erroneous.

On review, this court will uphold the trial court's findings of fact unless they are clearly erroneous. *See State v. Eckert*, 203 Wis.2d 497, 518, 553 N.W.2d 539, 547 (Ct. App. 1996). Credibility of witnesses and the weight to be accorded their testimony are matters for determination by the finder of fact. *See Chapman v. State*, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975). Although a reviewing court may affirm a trial court's decision based on the facts of record, *see State v. Echols*, 175 Wis.2d 653, 672, 499 N.W.2d 631, 636 (1993) ("An implicit finding of fact is sufficient when the facts of record support the decision of the trial court."), in this case, both the facts of record and the trial court's findings are unclear.

The trial court's findings are problematic in three respects:

1) The statement, "The officer's testimony is consistent," is ambiguous and may be inaccurate. If the transcript accurately reflects the trial court's intention to refer to "officer's," singular, rather than "officers'," plural, it is impossible to discern which officer the trial court meant. If, however, the trial court actually was intending to refer to the consistency between the testimony of the two officers, its statement fails to address the inconsistency between the officers' accounts of whether Officer Dzwonkowski told Officer McNair about a gun.

2) The statement, "[The officer's testimony] does over-exaggerate," is confusing, at best. Once again, it suffers from the singular/plural uncertainty. Moreover, if the transcript is accurate, it provides the trial court's assessment that the unspecified officer or both officers "over-exaggerate" — hardly a finding consistent with credibility.

3) The evidence provides no support for the trial court's statement, "The Court takes into account both the defendant by his own admission he has at least one criminal conviction." The only testimony on the subject was Johnson's. He acknowledged one arrest, not a conviction (and, in fact, the sentencing hearing confirmed that he had no criminal convictions).

Thus, the record establishes that the trial court based its conclusion on one factual finding that was clearly erroneous and others that remain entirely uncertain if not inaccurate. Accordingly, this court reverses the judgment and remands the case to Judge Ronald S. Goldberger for review of the suppression hearing transcript, correction of any typographical errors in the transcribed rendition of his decision, clarification of his decision where necessary, and determination of Johnson's motion based on factual findings supported by the record.

*By the Court.*—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

